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No. 241

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

JOHN TORPATS, *Petitioner*

v.

JOHN A. McCONE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No.

JOHN TORPATS, *Petitioner*

v.

JOHN A. McCONE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

John Torpats, by and through counsel, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above case on March 23, 1962.

OPINIONS BELOW

The United States District Court for the District of Columbia rendered no opinion. The opinion of the Court of Appeals is reprinted in the Appendix hereto on page 1a.

JURISDICTION

The judgment of the Court of Appeals was entered on March 23, 1962 (App., infra, pg.). A timely petition for rehearing in banc was denied on April 11, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Section 102(c) of the National Security Act of 1947 is quoted in the Opinion below (page 2a of the Appendix).

QUESTION PRESENTED

Were genuine issues of material facts presented by the complaint and affidavits filed in this case, the Rule in *Service* v. *Dulles* being applicable.

STATEMENT

Petitioner was first employed by the Central Intelligence Agency, of which respondent was Director, on February 23, 1949. On January 30, 1961, his employment was terminated "pursuant to authority contained in Section 102(c), National Security Act of 1947. Petitioner filed suit in the United States District Court for the District of Columbia on April 11, 1961, praying for reinstatement in his position.

Sub-paragraphs (o), (p) and (q) of paragraph 6 of the complaint alleged in part:

> "o. On April 10, 1960, plaintiff requested and was granted by the Director of the Agency the right to appeal to him in person before any separation action was taken in his case by the Director.
>
> "p. In June of 1960, plaintiff was told that he would be granted a hearing 'on the 1958 charges and some others' under a specified Agency Regulation. . . .

q: Plaintiff was summoned to the Office of the Director on January 27, 1961, at which time, without giving plaintiff an opportunity to say anything, the Director, without reviewing the record, read plaintiff an already prepared order directing that plaintiff be separated unless he resigned or retired."

During the period of April 19, 1960, until January 30, 1961, Regulation 20-700, regularly promulgated by the respondent Director on June 8, 1959, was in effect with respect to separations in the Central Intelligence Agency. (Record p. 15).

Respondent moved for summary judgment or in the alternative to dismiss. In support thereof, he filed two personal affidavits, the second of which corrected erroneous averments of the first, which, as he averred were "set down through an oversight in the preparation thereof". In final effect, after correction, respondent's affidavit was that petitioner was discharged on the basis of fitness reports made by his supervisors; that certain senior officials had "reviewed the matter" and discussed it with petitioner; that respondent himself "thoroughly reviewed the case, which included consultation with the senior officials mentioned above"; that he "determined that Mr. Torpats was unsuitable for continued employment in the Central Intelligence Agency and deemed it necessary and advisable in the interests of the United States to terminate his employment"; and that while petitioner was given an opportunity to discuss his last year's assignment with representatives of the Director of Personnel and to present any facts he deemed appropriate, respondent did not appoint an "Employment Review Board." (Record App. 9-11, 18-21). Petitioner filed an affidavit in opposition to respondent's motion.

With respect to sub-paragraphs (o), (p) and (q) of the complaint as above quoted, petitioner averred the circumstances in which he applied for and was promised the right to appeal to the Director before a decision was made; the circumstances in which he claimed and the manner in which he was promised a "hearing" pursuant to Regulation 20-700; the representations made to him by officials which led him to believe that an Employment Review Board had been appointed to hear the charges against him and his defenses; the content of the proceedings on June 13, 1960, ostensibly pursuant to Regulation 20-700, before Messrs. Pollock and Lott and their failure to conform to the applicable regulation; the failure of the General Counsel to consider the merits of plaintiff's case, and the General Counsel's statement of the Director's duties under paragraph 102(c) of the Security Act of 1947; the fact that the assistant to the Inspector General stated he was not going to consider the merits of the case; the fact that the Deputy Director stated he did not read the transcript of the hearing; and the content of the conversation with respondent. (Record, App. 22-44).

Subsequently, respondent filed the affidavit of Emmett D. Echols, Director of Personnel, who averred that he had reviewed petitioner's work performance for the period May 15, 1959 through June 1960; that he had determined that it did not meet Agency standards; that he had recommended his termination; that no Employment Review Board had been appointed to advise the Director concerning his action in January 1961. (Record App. 45-46).

On July 27, 1961, respondent's motion for summary judgment was granted by the District Court. The United States Court of Appeals for the District of Columbia Circuit affirmed.

REASONS FOR GRANTING THE WRIT

The question in this case is one of general importance and substance relating to the construction of Section 102(c) of the National Security Act of 1947, which has not been but should be settled by this Court and the Court of Appeals has not given proper effect to the decision of this Court in *Service* v. *Dulles*, 354 U.S. 363 (1957).

I. Under Section 102(c) of the Security Act of 1947, Regulation 20-700 of the Central Intelligence Agency required respondent to accord to petitioner a fair hearing which he has alleged was denied to him.

Respondent in this case adopted Regulation 20-700 on June 8, 1959; he admitted in his affidavits that these regulations applied to involuntary separations in the Central Intelligence Agency. Petitioner's separation was involuntary; the separation occurred while Regulation 20-700 was in effect. *Service* v. *Dulles*, *supra*, holds that an agency head is bound by such regulations, even if he has discretionary authority; and petitioner has alleged that respondent violated the regulation in separating him. In such circumstances the only possible ground for disputing the materiality of the issues raised by the complaint and affidavits would be that Regulation 20-700 was deficient in content to give petitioner a right to a hearing and review by respondent.

Petitioner concedes that the Government, as an employer, has an absolute "right" to terminate the employment of its employees unless there is some statute or regulation limiting this right. There is a great distinction to be noticed between an abstract "right" held by our Government and the manner in which it is exercised by the person representing the Govern-

ment. Although Congress may make a man the instrument by which sovereign power is to be applied, it does not, indeed it cannot, exempt him from the constitutional limitations applicable to the execution of the power of the sovereign.

The statute applicable to respondent's duty in this case, granted him "discretion" to terminate the employment of any employee "whenever he shall deem such termination necessary or advisable in the interests of the United States". Here, as in *Accardi* v. *Shaughnessy*, 347 U.S. 260, 267 (1953), the word "discretion" means that respondent must exercise his authority "according to his own understanding and conscience". He has, thus, to make a decision, but he also has a substantive standard to which he must conform, i.e. he must exercise his authority only in furtherance of the "interests of the United States."

The imposition of this substantive standard by the Congress carries with it a duty to determine what the interests of the United States are in any case of involuntary separation. The phrase "in the interests of the United States" is not an empty one. It requires the respondent to be objective, to wield his axe; only after consideration of the facts. His decision may ultimately result in personal hardship to the employee, but this does not mean that he may disregard the employee entirely. Congress cannot be presumed to have authorized the defendant to make a "hunch" decision. Reason is necessarily impiled. The Courts have said that discretionary authority, such as is here involved, cannot be abused; that decisions with such authority must not be made arbitrarily. *Croker* v. *United States*, 130 Ct. Cls. 567, 574, 127 F. Supp. 568, 572 (1955). Here, at the very least, the respondent

must be able to say that the advantage which will flow to the United States by severance of this employee will overbalance the advantage that will flow to the United States by retaining his services.

Such a decision requires the head of the agency to consider the contribution made by the employee in the past, the contribution he may make in the future and, if he finds these to be valuable, whether some other decision besides separation of such employee would not redound to the greater interest of the United States.

These considerations imply that whatever the statute says, a process is involved in making the determination of substance. In short, evidence must be considered and a choice must be made.

In this suit, petitioner contends, respondent laid down express rules to guide his subordinates and himself in exercising the sovereign power which the statute has assigned to his discretion. Petitioner thus invokes the principle which this Court has applied in a line of cases beginning with *Accardi* v. *Shaughnessy*, *supra*, and running through *Service* v. *Dulles*, *supra*, *Watson* v. *United States*, 162 F. Supp. 755 (Ct. Cls. 1958) and *Vitarelli* v. *Seaton*, 359 U.S. 535 (1959). Mr. Justice Frankfurter epitomized the principle by saying that "he that takes the procedural sword shall perish with that sword". *Vitarelli* v. *Seaton*, *supra*, at 547.

In both *Service* and *Vitarelli*, as well as in the related case of *Greene* v. *McElroy*, 360 U.S. 474 (1959), the plaintiff had sought to test the administrative decision according to the constitutional standards of due process, invoking the 5th Amendment for that purpose. In each of these three cases, however, this Court

refused to "get to" the constitutional argument and rested its decision solely on what Mr. Justice Frankfurter finally characterized as a "judicially evolved rule of administrative law". *Vitarelli* v. *Seaton*, *supra*, at 547.

But the view that the rule has been judicially evolved does not include the principle that an agency head, who must use his discretionary authority to achieve a substantive goal, may become a supra-constitutional officer by the mere device of not issuing regulations. The exercise of discretionary authority according to a substantive standard involves the process, whether the agency head has bound himself expressly to a particular procedure or not; and the Constitution requires the process always to be an objective, not subjective one. The principle is inherent in our conception of law and government. It cannot be escaped either inadvertently or adverteintly as long as our present Constitution stands.

Naturally where the agency head, in exercise of valid rule making power, has issued regulations the regulations have the force of law, a right arises thereby in an employee to whom the regulations apply, and he may enforce it as a personal right.

This principle has been applied by the Executive Branch, and constructively approved by Congress, in interpreting the so-called McCarran Rider, which differed in pertinent wording from the statute involved here only in that (a) it was applicable to the Secretary of State instead of the Director of Central Intelligence and (b) the Secretary of State was authorized to act in his "absolute discretion" instead of in his mere "discretion" as is the case of the Director of Central Intelligence.

The McCarran Rider was first enacted in 1946 (Department of State, Justice, Commerce and the Judiciary Appropriation Act, 1947, July 5, 1946, c 541, Title I, 60 Stat. 446, 458). In the Spring of 1950 the State Department, in reporting to Congress on the administration of the Department's security and loyalty programs, stated that

> "In (its) considered view the McCarran rider was subject to procedural limitations. The McCarran rider was not interpreted as permitting reckless discharge or the exercise of arbitrary whims." Sen. Rep. 2108, 81st Cong. 2d Sess. 15-16, as quoted in *Service* v. *Dulles, supra,* at 378.

Subsequently, the McCarran Rider having been reenacted in the General Appropriation Act, 1951 (September 6, 1950, c. 896, paragraph 1213, 64 Stat. 595, 768), the President instructed the Secretary of State as follows:

> I am sure you will agree that in exercising the discretion conferred upon you by Section 1213, every effort should be made to protect the national security, without unduly jeopardizing the personal liberties of the employees within your jurisdiction. Procedures designed to accomplish these two objectives are set forth in Public Law 733, 81st Congress, which authorizes the summary suspension of civilian officers and employees of various departments and agencies of the Government, including the Department of State.
>
> "In order that officers and employees of the Department of State may be afforded the same protection as that afforded by Public Law 733, it is my desire that you follow the procedures set forth in that law in carrying out the provisions of Section 1213 of the General Appropriation Act." (As quoted in *Service* v. *Dulles, supra,* at 379).

Public Law 733, referred to by the President in the foregoing passage from his letter of September 6, 1950, was the Act of August 26, 1950, c. 803, Section 1, 64 Stat. 476, 5 U.S.C. Section 22-1. This statute provided a procedure of notice and hearing not unlike that which the State Department subsequently adopted under still another re-actment of the McCarran Rider, viz. the Act of October 22, 1951, c. 533, Section 103, 65 Stat. 581. Section 393.1 of the State Department's regulations provided:

> "The standard of removal from employment in the Department of State under the authority referred to in Section 391.3 shall be that on all the evidence reasonable grounds exists for belief that the removal of the officer or employee involved is necessary or advisable in the interest of national security. The decision shall be reached after consideration of the complete file, arguments, briefs, and testimony presented." U.S. Department of State, Manual of Regulations and Procedures (1951) Vol. I, Sec. 393.1.

In 1957, the McCarran Rider, the President's and the State Department's interpretations, and the State Department's regulations, all as partially quoted above, came before this Court in *Service* v. *Dulles, supra.* The Court found that Congress had repeatedly re-enacted the McCarran Rider after Congress had been "advised in unmistakable terms that the Secretary had seen fit to limit by regulations the discretion conferred upon him . . ." Id. at 379, and the Court held that in this way Congress had confirmed the interpretation of the statute made by the Executive Branch of the Government.

A similar argument may be made for Sec. 102(c) of the National Security Act. Three years after the

State Department had notified Congress of the Executive Branch's interpretation of the McCarran Rider. Congress revisited Sec. 102 of the National Security Act and adopted extensive amendments, but without changing the wording of sub-section (c). Act of April 4, 1953, c. 16, 67 Stat. 20.

When the National Security Act was first enacted in the 80th Congress, the committee reports said nothing that would indicate a Congressional intent to distinguish the effect of sub-section (c) from the effect given the McCarran Rider by the State Department in its report to Congress in the Spring of 1950. See H. Rep. No. 1051, July 24, 1947 and S. Rep. No. 239, June 5, 1947, both in U.S. Code Congressional and Administrative News, 80th Congress, 1947, at 1483, 1484, 1487, 1494. Moreover, had there been such an intent, Congress had ample opportunity to write it into the sub-section when it amended the section in 1953.

The McCarran Rider and Sec. 102(c) of the National Security Act, under which respondent issued Regulation 20-700 and exercised discretionary authority in this case, are essentially the same and mean the same. It follows that Sec. 102(c) is subject to procedural limitation.

The decision which had to be made in this case was whether the interests of the United States would be best served by retaining or separating petitioner. To make that decision, it was obviously necessary to hear him in his own behalf, otherwise information on one side of the question might be lacking. Obviously, information concerning him, even when given by himself, might be untrustworthy unless the hearing is a fair one; the person or persons who hear him must be

impartial. If the employee's separation is to benefit the United States, someone must say why, and the employee must be fairly advised of these reasons for his separation and given an opportunity to answer and to give explanations and to introduce evidence. Lastly, the person authorized to make the decision must know from the impartial hearing officer (if someone other than the deciding officer holds the hearing), the findings made at the hearing before he decides. But the process actually provided will not be regarded as due process merely because someone went through the motions. The process must be in good faith, and not in mockery. These are fundamental principles, hardly needing citations of authority. They are taken from Corwin's edition of the Constitution, Analysis and Interpretation (1952) 846, 849.

Turning to Regulation 20-700, it will be seen that the foregoing requirements have been provided with but little variation from the State Department Regulation quoted above. The Regulation does not specifically mention a "hearing", but there is a reference to "all pertinent information", including that which is "favorable" as well as that which is unfavorable to the employee, and there is a provision for a tribunal called an Employment Review Board, which the Director may substitute for his own services if he chooses. Properly interpreted, these provisions clearly mean that if an Employment Review Board is appointed, respondent must review its findings and recommendations directly before he exercises his statutory discretion; if an Employment Review Board is not appointed, then respondent himself must review, impartially, the employee's record, the basis for his proposed separation, such evidence and testimony as the em-

ployee may submit after notice of the basis on which he is proposed to be separated.

This Court in the *Service* case, at page 388, said of the regulation promulgated by the State Department pursuant to the McCarran Rider:

> "The essential meaning of this section, in other words, was that the Secretary's decision was required to be on the merits."

Petitioner submits that respondent's regulation means the same.

Petitioner has alleged by his complaint that respondent did not comply with his own regulations and therefore was either in the dark as to the merits or participated in an abuse of authority when he made his decision. For the most part, respondent has in his affidavit ignored these allegations, clearly material under the theory of *Service* v. *Dulles*, *supra*, as above demonstrated. In *Watson* v. *United States*, the Court of Claims first denied relief on the ground that a probationary employee was not entitled to notice and hearing under the Civil Service statutes and regulations. *Watson* v. *United States*, 137 Ct. Cls. 557 (1957). This Court, however, granted a writ of certiorari and remanded the case for further proceedings "in the light of *Service* v. *Dulles*", *Watson* v. *United States*, 355 U.S. 14 (1957).

2. There were genuine issues of material fact presented by the complaint and the affidavits.

Service v. *Dulles*, *supra*, established that even where a head of agency has discretionary authority to discharge an employee, he must follow such objective rules as he has imposed upon himself. This principle always

presents two issues of material fact in every case in which a discharged employee contends, with appropriate allegations, that he had been unfairly discharged by an agency head who holds discretionary authority, viz. (1) whether the agency head subjected the employee's involuntary separation to procedural regulation, and (2) if so, whether he followed such regulation in effecting the employee's separation.

In this case, petitioner has alleged that he claimed and that he was promised, on the basis of regulations promulgated by respondent, a fair and impartial hearing of the proposal to separate him, and (2) that while he was accorded a hearing, such hearing was not fair and impartial, and the manner in which decisions were made concerning his case did not conform to the applicable regulations.

Since no answer was filed, petitioner's allegations were clearly adequate, under the theory of the *Service* case, to sustain a cause of action. Consequently, if summary judgment for respondent is to be upheld, the Court must find in respondents supporting affidavits evidence that will put the case in the posture of not presenting any genuine issue of material fact, and the burden was on the movant, respondent here. *Wittlin* v. *Giacalone*, 81 App. D.C. 20, 154 F. 2d 20, 22 (1946).

The motion itself tests the materiality of the genuine issues of fact, if any, by putting the plaintiff's theory of law in issue for judicial decision. Under Rule 56(e), an affidavit accompanying a defendant's motion for summary judgment, to be effective at all, must offer admissible evidence in proof to show that plaintiff's formal allegations do not present a genuine issue. This evidence must be more than a mere negation of

the ultimate material fact alleged by plaintiff, which is to say, as has been held, that defendant will not be allowed to "push the other party out of court by swearing he has no case". *Belanger* v. *Hopeman Bros., Inc.* 6 F.R.D. 459, 461 (D. Me. 1947).

But this is precisely what respondent's affidavits attempted to do. Petitioner alleged that he was "told that he would be granted a hearing . . . under specified Agency regulation" and that respondent granted him "the right to appeal" to him "in person before any separation action was taken in his case"; and by affidavit petitioner supplied evidentiary details to support these allegations, including the designation of two officers of a hearing board by officers with regularly delegated authority, the representations of the same officers that a hearing would be held pursuant to Regulation 20-700 and the actual proceedings of the hearing before the Board. With respect to these allegations and evidence the respondent (and one of his subordinates) merely swore that respondent "did not appoint an Employment Review Board in this case". This averment, however, was in the nature of an answer; it merely put one of the alleged ultimate facts in issue, which the Court is not allowed to resolve on a motion for summary judgment.

The same principle applies to other material allegations. Petitioner alleged that respondent acted "without reviewing the record" and "without giving plaintiff an opportunity to say anything" (both being material under the provisions of the regulations and *Service* v. *Dulles*), and this he was ready to prove to a trier of fact, as is shown by his affidavit of the proceedings in respondent's office on January 27, 1961. To these allegations and offer of proof, respondent merely

swore that he "personally reviewed the employment record of Mr. Torpats . . ." and "thoroughly reviewed the case, including consultations with the senior officials mentioned above". Whether he reviewed the records or the case was thus put in issue, for respondent had no better right to be believed on motion than petitioner; and the averment does not show the formal allegations to lack genuiness. If the reference to consultation with the senior officials is evidence of respondent's having reviewed the case, petitioner's affidavit to the effect that these same senior officials had admitted that they had relied on the reports made by his biased accusers instead of on the transcript of the proceedings before the two-man board puts the weight of respondent's averment in doubt. Petitioner is entitled to cross-examine all these officials before a trier of fact to determine whether a good faith review, consistent with the regulations, was given.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

Byron N. Scott
Attorney for Petitioner

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16616

JOHN TORPATS, *Appellant*

v.

JOHN A. McCONE,
Director, Central Intelligence Agency, *Appellee*

Appeal from the United States District Court for the District of Columbia

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Decided March 23, 1962

Mr. Baron N. Scott, with whom *Mr. Robert Dan Scott* was on the brief, for appellant.

Mr. Judah Best, Assistant United States Attorney, with whom *Messrs. David C. Acheson*, United States Attorney, *Nathan J. Paulson* and *Thomas D. Quinn, Jr.*, Assistant United States Attorneys, were on the brief, for appellee. *Mr. Charles T. Duncan*, Principal Assistant United States Attorney, and *Arnold T. Aikens*, Assistant United States Attorney, also entered appearances for appellee.

Before PHILLIPS, *Senior United States Circuit Judge for the Tenth Circuit*,* and WASHINGTON and BURGER, *Circuit Judges*.

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* Sitting by designation pursuant to Sec. 294(d) Title 28, U.S. Code.

PER CURIAM: Appellant sued in the District Court to compel the Central Intelligence Agency to restore him to his former position. He had been employed by C.I.A. from 1949 to 1958. During the course of his employment he progressed from GS-12 to GS-14 and was then demoted to GS-13. At various times preceding the discharge which he now challenges, he was in conflict with superiors. He appeals from summary judgment for the appellee.

On January 30, 1961, appellant received notice from the agency that his employment was

> Terminated pursuant to authority contained in Section 102(c), National Security Act of 1947. This termination does not affect your right to seek or accept employment in any other department or agency of the U. S. Government if you are declared eligible for such employment by the U. S. Civil Service Commission.

The pertinent part of the National Security Act of 1947, 61 Stat. 498, 50 U.S.C.A., § 403 (c) (1951) provides:

> (c) Notwithstanding the provisions of section 6 of the Act of August 24, 1912 (37 Stat. 555), or the provisions of any other law, the Director of Central Intelligence may, in his discretion, terminate the employment of any officer or employee of the Agency whenever he shall deem such termination necessary or advisable in the interests of the United States, but such termination shall not affect the right of such officer or employee to seek or accept employment in any other department or agency of the Government if declared eligible for such employment by the United States Civil Service Commission.

This statute vests in the Director of the C.I.A. a broad discretion to terminate employees in the interest of the United States but it is to be distinguished from a so-called

"security" discharge such as was involved in *Service* v. *Dulles*, 354 U.S. 363 (1957), and related cases.

Regulation 20-700 promulgated by the C.I.A. calls for an impartial review by the Director of all pertinent information upon which he relies in terminating, whether favorable or unfavorable, to "the extent that is consistent with the interests of the U.S." C.I.A. Reg. 20-700 § 4. It also provides that the Director "*may* appoint an Employment Review Board to advise him concerning any particular case." *Id.* § 7.

The record contains the sworn statement of the Director that prior to taking action adverse to appellant he "thoroughly reviewed the case," consulted with senior officials before concluding to terminate appellant as "unsuitable for continued employment . . . and deemed it necessary in the interests of the United States to terminate his employment." The appellant was also given the opportunity, not required by any regulation, to interview high Agency officials as well as the Director regarding his employment difficulties. The record is clear that no Employment Review Board was ever appointed under the Regulation and appellant's complaints respecting such a Board are without merit.

As we have noted this is not a termination for security reasons but for lack of suitability for the positions and grades available. There is no bar of any kind to employment by other agencies of government. We hold that the Director acted within the authority conferred upon him by Congress and in accordance with his own regulations.

Affirmed.

Filed April 11, 1962

UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1961

No. 16616

JOHN TORPATS, *Appellant*

v.

JOHN A. McCONE,
Director, Central Intelligence Agency, *Appellee*

Before: Wilbur K. Miller, Chief Judge, and Edgerton, Prettyman, Bazelon, Fahy, Washington, Danaher, Bastian, and Burger, Circuit Judges, in Chambers.

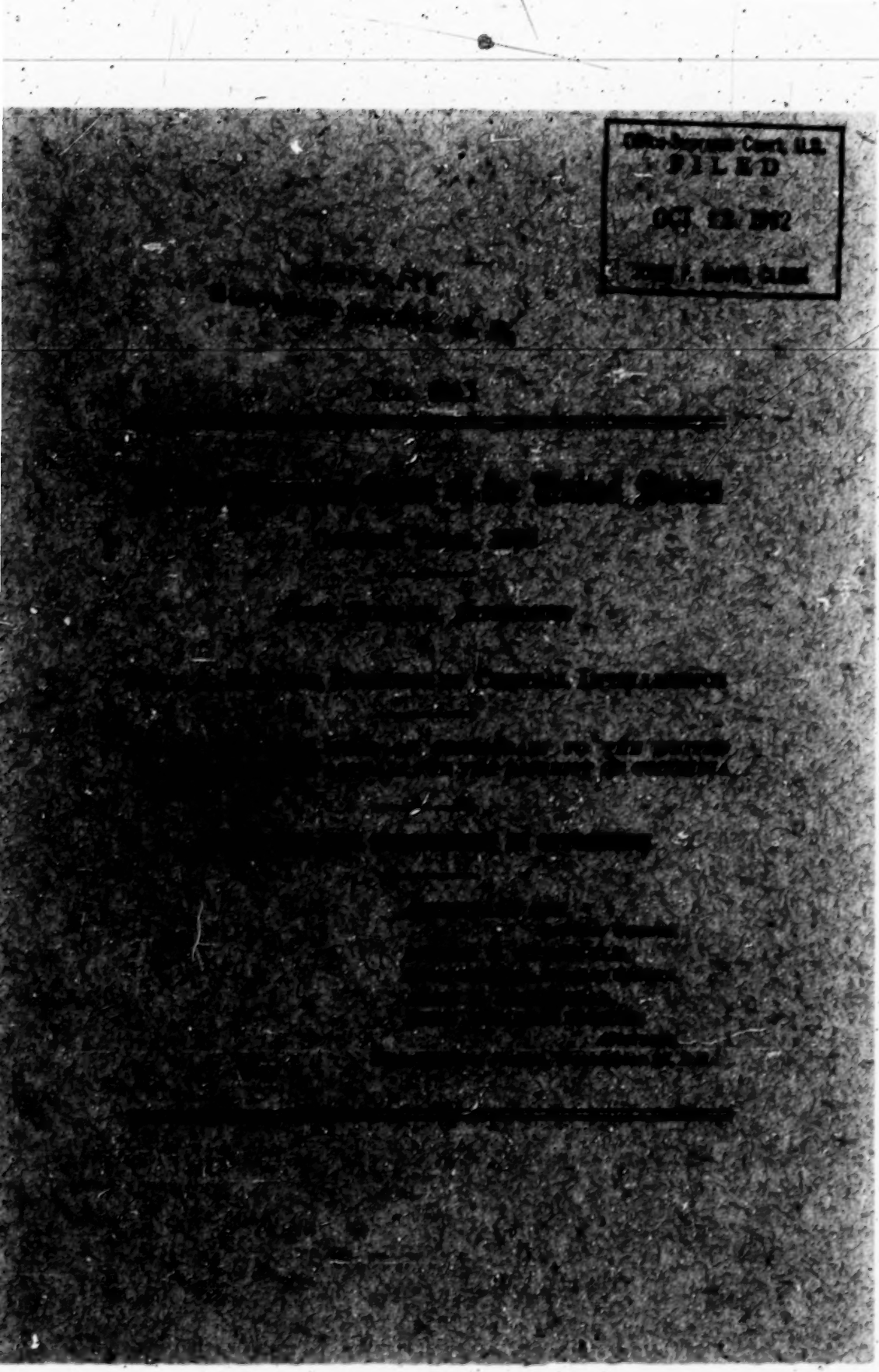
Order

Upon consideration of appellant's petition for rehearing en banc, it is

ORDERED by the court that the petition be, and it is hereby, denied.

Per Curiam.

Dated: April 11, 1962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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 241

JOHN TORPATS, PETITIONER

v.

JOHN A. McCONE, DIRECTOR OF CENTRAL INTELLIGENCE

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The order of the United States District Court for the District of Columbia is unreported. The opinion of the Court of Appeals (Pet. App. 1a-3a) is reported at 300 F. 2d 914.

JURISDICTION

The judgment of the court of appeals was entered on March 23, 1962. A timely petition for rehearing *in banc* was denied on April 11, 1962. The petition for writ of certiorari was filed on July 10, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the separation of petitioner from his position in the Central Intelligence Agency was in compliance with the applicable statute and agency regulation.

2. Whether the courts below correctly concluded that there were no genuine issues of material fact.

STATUTE AND REGULATION INVOLVED

Section 102(c) of the National Security Act of 1947, 61 Stat. 498, 50 U.S.C. 403(c), provides as follows:

> (c) Notwithstanding the provisions of section 6 of the Act of August 24, 1912 (37 Stat. 555), or the provisions of any other law, the Director of Central Intelligence may, in his discretion, terminate the employment of any officer or employee of the Agency whenever he shall deem such termination necessary or advisable in the interests of the United States, but such termination shall not affect the right of such officer or employee to seek or accept employment in any other department or agency of the Government if declared eligible for such employment by the United States Civil Service Commission.

CIA Regulation 20-700, dated 8 June 1959 provides in pertinent part as follows:

> SECTION II: INVOLUNTARY SEPARATIONS
>
> 3. STATUTORY POWERS OF THE DIRECTOR OF CENTRAL INTELLIGENCE
>
> The Director of Central Intelligence is empowered to terminate the employment of any Agency employee when he determines that such

action is necessary or advisable in the interests of the United States. Termination action is accomplished under the authority of section 102(c) of the National Security Act of 1947 quoted below: [Section 102(c), as above, here omitted]

4. POLICY

In order to meet the exacting responsibilities placed upon the Agency and pursuant to his statutory authority, the Director of Central Intelligence may separate any employee immediately when he deems it necessary or advisable in the interests of the United States. To the extent that is consistent with the interests of the United States, separations shall be effected on the basis of a thorough and impartial review of all pertinent information, favorable and unfavorable to the individual concerned.

* * * * *

6. RESPONSIBILITIES

a. * * *

Operating Officials and Heads of Career Services are responsible for continuously evaluating the performance and conduct of employees under their respective jurisdictions. They should advise employees of their shortcomings and warn them of the consequences of continued substandard performance or behavior.

b. * * *

Deputy Directors or Heads of Career Services are responsible for identifying personnel under their jurisdiction who should be considered for separation, and are responsible for reviewing each case with the Director of Per-

sonnel and recommending to the Director of Personnel separation of those individuals who, in their view, do not meet Agency standards on such bases as work performance, security or conduct.

c. * * *

The Director of Personnel is responsible for reviewing all pertinent information and for recommending appropriate action to the Director of Central Intelligence.

* * * * *

7. EMPLOYMENT REVIEW BOARD

The Director of Central Intelligence may appoint an Employment Review Board to advise him concerning any particular case.

STATEMENT

On January 30, 1961, petitioner received notice that his employment with the Central Intelligence Agency was terminated pursuant to the authority contained in Section 102(c) of the National Security Act of 1947, *supra*, p. 2. (R. 13.) The notice further stated that the termination would not affect petitioner's right to seek or accept employment in any other department or agency if declared eligible for such employment by the Civil Service Commission. (R. 13.)

Petitioner thereafter brought this action against respondent's predecessor, seeking a declaratory judgment that his separation was illegal and a mandatory injunction directing his restoration to his former position. (R. 2–7.) The gravamen of his complaint was that the separation was not effected in accordance with the applicable regulation, CIA Regulation

20–700, dated June 8, 1959, *supra*, pp. 2–4. (R. 2–7.)

In this connection, petitioner asserted that, in 1958, he had received an unsatisfactory performance rating and was thereupon informed that he was being separated under Section 102(c). (R. 4–5.) Following hearings, the Director decided in May, 1959, that petitioner should be transferred to another component of the Agency and that a final determination respecting petitioner's continued employment should be deferred pending the Director's personal review of a report of petitioner's performance to be rendered on April 30, 1960. (R. 5–6.)

The April, 1960, report stated that petitioner's overall performance was satisfactory but that his services were not needed and that there were no other suitable positions available in the Agency. (R. 6, 9.) Petitioner was offered a hearing, which was adjourned when petitioner refused to participate without being given more specific charges and the right to representation by counsel. (R. 6.) His separation ensued. (R. 6–7.)

Respondent moved for summary judgment or, in the alternative, for dismissal of the complaint (R. 8), on the basis of his personal affidavit, which recited, *inter alia:* (1) that he "thoroughly reviewed the case"; (2) that he determined that petitioner "was unsuitable for continued employment in the Central Intelligence Agency and deemed it necessary and advisable in the interests of the United States to terminate his employment"; (3) that "in accordance with authority vested in [him] as Director of Central Intelligence under section 102(c) of the National Security Act, as amended,

[he] directed on 27 January 1961 the termination of the employment of [petitioner] effective 30 January 1961"; (4) that the only administrative regulation of the Agency which implements section 102(c) is Regulation 20-700; (5) that an Employment Review Board was not appointed in this case. (R. 18–21.)

On July 27, 1961, the district court entered an order granting summary judgment to respondent. (R. 46.) On March 23, 1962, the Court of Appeals affirmed, *per curiam*. (R. 47–49.)

ARGUMENT

Further review of this case is not warranted. The petition presents no unsettled question of general importance, the decision below is clearly correct, and there is no conflict of decisions.

1. There is no merit to petitioner's contention that he was entitled to a full-dress hearing with confrontation of witnesses, specification of charges, counsel, and cross-examination, before being separated from the Central Intelligence Agency. Section 102(c) of the National Security Act, *supra*, p. 2, under which petitioner's employment was terminated, authorizes the C.I.A. Director, in his discretion, to discharge any Agency employee whenever he deems such discharge necessary or advisable in the interests of the United States. CIA Regulation 20–700, *supra*, pp. 2–4, implements this authority. It provides that the Director may, when he deems it necessary or advisable in the national interests, separate any Agency employee "immediately", but that, to the extent consistent with the national interests, there shall first be a review of all

pertinent information, favorable or unfavorable to the employee concerned.[1] Neither statute nor regulation provides for a hearing; neither mentions a hearing; and neither could, by any reasonable construction, be said to envisage a hearing.

Petitioner insists, however, that provision for a judicial-type hearing must be read into the statute and regulation if they are to pass constitutional scrutiny under the due process clause of the Fifth Amendment. In this he is mistaken. See *Cafeteria & Restaurant Workers Union, Local 473, AFL-CIO* v. *McElroy*, 367 U.S. 886, 896; *Vitarelli* v. *Seaton*, 359 U.S. 535, 539; *Taylor and Marshall* v. *Beckham (No. 1)*, 178 U.S. 548, 575–578; *Keim* v. *United States*, 177 U.S. 290, 293–294; *Parsons* v. *United States*, 167 U.S. 324, 331–334; *Crowshaw* v. *United States*, 134 U.S. 99, 108; *In the Matter of Heaven*, 13 Pet. 230, 246, 259.

This was not, as the court of appeals correctly noted (Pet. App. 2a–3a), a termination for security reasons but for lack of suitability for positions and grades available within the Agency. There is no bar to employment by other agencies of government. Moreover, though not required by statute or regulation, petitioner was in fact accorded hearings and, on several occasions, availed himself of the opportunity for interviews with high Agency officials, including respondent's predecessor, regarding his employment

[1] This regulation superseded CIA Regulation 20-740 (dated November 1, 1954), which was involved in *George J. Rhodes* v. *United States*, a case now pending before this Court on petition for writ of certiorari (No. 224, this Term).

difficulties. (R. 19–20, 28–44.) In these circumstances, the procedures followed were clearly sufficient.

2. There is no substance to petitioner's contention that the district court erred in granting summary judgment under Rule 56 of the Federal Rules of Civil Procedure.

a. Petitioner alleged that an Employment Review Board (see CIA Regulation 20–700(7), *supra*, p. 4) was appointed. (R. 4.) Respondent swore that he did not appoint such a Board. (R. 21.) The conflict, however, was only apparent since it was clear from the context that respondent spoke only with reference to the period from 1958 until petitioner's discharge in 1961, while petitioner was referring to the Board appointed in 1956 in connection with charges which resulted in his demotion at that time. (R. 4.) In any event, the issue is immaterial since Regulation 20–700 neither requires the Director to appoint an Employment Review Board nor to heed its advice if one is appointed.

b. Petitioner's complaint further alleged that respondent ordered his termination without reviewing the record. (R. 7.) Respondent, by sworn affidavit submitted in support of the motion for summary judgment, stated that he "personally reviewed the employment record" of petitioner and that he "thoroughly reviewed the case." (R. 19, 20.) Petitioner urges that he was entitled to cross-examine respondent before a trier of fact "to determine whether a good faith review, consistent with the regulations, was given." (Pet. 16.)

The presumption of validity which attaches to the formal recitations of public officials prevents the review requirement from becoming an issue in this case. The law does not countenance examination of a public officer in an attempt to impeach the veracity of his sworn statement, at least where, as here, there are no other allegations of collateral facts plainly indicating its falsity. *United States* v. *Morgan*, 313 U.S. 409, 422; *Great Lakes Airlines, Inc.* v. *Civil Aeronautics Board*, 291 F. 2d 354, 370 (C.A. 9), certiorari denied, 368 U.S. 890, rehearing denied, 368 U.S. 936; *Air Line Pilots Ass'n, Int'l.* v. *Quesada*, 286 F. 2d 319, 320 (C.A. 2), certiorari denied, 366 U.S. 962, rehearing denied, 368 U.S. 870; *Willapoint Oysters, Inc.* v. *Ewing*, 174 F. 2d 676, 695–696 (C.A. 9), certiorari denied, 338 U.S. 860, rehearing denied, 339 U.S. 945. See, also, *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U.S. 197, 226, 228.

The court there stated:

> Furthermore, we cannot allow the Administrator's recitation that he has personally examined and considered the evidence in making his decision to be successfully challenged by a mere allegation in a brief. We have neither moral nor legal right to presume that only those who occupy judicial office respect their obligations and perform their official duties honestly, sincerely, and conscientiously. Nor can we presume the subordinate personnel to be a camarilla. It requires more than a mere allegation (or affidavit on information and belief, which is not even found here) to upset the presumption of validity attaching to * * * the formal recitations of public officials.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be denied.

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OCTOBER 1962.

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No. 241

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

JOHN TORPATS, *Petitioner*

v.

JOHN A. McCONE

PETITIONER'S REPLY TO RESPONDENT'S OPPOSITION TO PETITION FOR CERTIORARI

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---

1. Petitioner has never contended at any juncture, after taking his cause to court, that he was entitled under the statute or the regulation to what respondent refers to as a "judicial-type hearing", nor that he was entitled to a "full dress hearing with confrontation of witnesses, specifications of charges, counsel and cross-examination." Petitioner affirmatively disclaimed any such contention in his Reply Brief in the Court of Appeals (pp. 2-3). He has contended, and still does,

only that, under Section 102(c) of the National Security Act and the Agency's Regulation 20-700, he was entitled to a "thorough and impartial review of all pertinent information favorable and unfavorable" to him before his separation could be effected legally. He contends that under the due process clause of the Constitution he had a right to know what the unfavorable information was and a right to be heard in his own behalf to refute the unfavorable and to give the favorable information before the Director could make a valid determination that his separation was "necessary and advisable in the interests of the United States".

Respondent says (p. 7) that petitioner "availed himself of the opportunity for interviews with high Agency officials". These are not apt words to describe petitioner's unsuccessful attempts to have somebody in authority in the Agency consider his case on the merits. The frustration of his purpose is described in detail in his affidavit (Record Appendix, 36-43).

2. a. While petitioner's complaint does allege that an "Employment Review Board" was appointed in 1956 and again in 1958, petitioner did not allege, in terms, that such a Board was appointed in 1960. He alleged in his complaint that he was told that he was to have a hearing under CIA Regulation 20-700, (Record Appendix, 6) and averred in his affidavit that he interpreted the promise of a hearing to be one before an Employment Review Board. (Record Appendix, 39). Respondent concedes that petitioner was "offered a hearing" and that one was convened (p. 5). Whether it was or was not an "Employment Review Board" appointed by the Director is not material. A hearing board, by whatever name it be called, was appointed

by somebody. Petitioner averred that it was not an "impartial" board in that it was composed of only two men, both of whom had recommended earlier that petitioner be separated (Record Appendix 39).

b. The principal material question of fact in this case is whether respondent's predecessor "personally reviewed the employment record" of petitioner and "thoroughly reviewed the case", as required by Regulation 20-700, i.e., did the man with the statutory authority, the Director, make a "thorough and impartial review of all pertinent information favorable and unfavorable" to petitioner. If he did not; he did not follow his own Regulation and under *Service* v. *Dulles*, 354 U.S. 363 and *Watson* v. *United States*, 355 U.S. 14, and 162 F. Supp. 755 (Ct. Cls. 1958), petitioner would be entitled to reinstatement. Respondent swears that he did review; petitioner swears that he did not. Petitioner's averments should have been taken as true on respondent's motion for summary judgment and the motion denied. If there be a genuine issue (as here) as to a material fact (as here) a motion for summary judgment must be denied. (Rule 56(c) Fed. R. Civ. P.; *Sartor* v. *Arkansas Natural Gas Corp.*, 321 U.S. 620, 627).

Respondent argues that "the review requirement" is not an issue because of "a presumption of validity which attaches to the formal recitations of public officials". It is a rebuttable one. The truth of the particular and general averments in respondent's affidavit has been attacked directly by petitioner in his affidavit on file. More than that, respondent's predecessor swore to a succession of statements in his first affidavit (Record Appendix 18-21). He, later, on his oath, retracted a material part of his first affidavit as

untrue and casually told the court that: "I will now set forth the correct version of the affidavit." (Record Appendix 18-19).

In the words of the case cited and quoted by respondent, there is a good deal more here than "a mere allegation in a brief" or an "affidavit on information and belief" to "upset the presumption of validity attaching to * * * the formal recitations" of this former public official.

The affiant himself has impeached "the veracity of his sworn statement";

The conclusion seems inescapable that respondent's predecessor signed an affidavit, which he did not prepare, without first determining whether all of the statements in it were true.

His sworn statements have been attacked by petitioner, under oath as a participant in the proceedings.

CONCLUSION

Since there was a genuine issue as to a material fact ("the review requirement"), certiorari should be granted and the case returned to the trial court for further proceedings.

Respectfully submitted,

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Attorney for Petitioner